Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1997

ROBERT CABRAL,

Petitioner,

v.

HEALY TIBBITTS BUILDERS, INC.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

To qualify for coverage under the Jones Act, 46 U.S.C. App. § 688(a), "a seaman must have a connection to a vessel . . . that is substantial in terms of both its duration and its nature." *Chandris, Inc. v. Latsis*, 515 U.S. 347, 368 (1995). Must an injured employee work on the high seas (as opposed to the navigable waters of an ocean harbor) to satisfy this requirement?

LIST OF PARTIES

All parties to the proceeding in the court of appeals appear in the caption of the case. Ten "John Doe" defendants were named in the complaint but were not parties to the proceeding in the court of appeals.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Robert Cabral respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals, as amended, reprinted as Appendix A ("App. A"), *infra*, at page 1a, is officially reported at 128 F.3d 1289 (CA9 1997). The order amending the original opinion (but not the amended opinion) is also reported at 1998 AMC 275.

The unamended opinion of the court of appeals, reprinted as Appendix B ("App. B"), *infra*, at page 12a, is officially reported at 118 F.3d 1363 (CA9 1997). It is also reported at 1997 AMC 2419.

The district court's Order Denying Plaintiff's Motion for Summary Judgment and Granting Defendant's Cross Motion for Summary Judgment, reprinted as Appendix C ("App. C"), *infra*, at page 21a, is reported at 1995 AMC 2099 (D. Haw. 1995). It has not been officially reported.

The district court's Order Denying Plaintiff's Motion for Reconsideration of Order Dated June 19, 1995 Denying Plaintiff's Motion for Summary Judgment and Granting Defendant's Cross Motion for Summary Judgment, reprinted as Appendix D ("App. D"), *infra*, at page 31a, is unreported.

JURISDICTION

Petitioner seeks review of the judgment of the Court of Appeals for the Ninth Circuit, which was dated and entered on October 15, 1997. On January 6, 1998, Justice O'Connor extended the time for filing a petition for certiorari to and including February 12, 1998. This petition was filed on that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1). The district court had jurisdiction under 28 U.S.C. § 1333(1) and 46 U.S.C. App. § 688(a).

STATUTE INVOLVED

The Jones Act, 46 U.S.C. App. § 688(a), provides, in relevant part, as follows:

> Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply. . . .

STATEMENT

The Jones Act, 46 U.S.C. App. § 688(a), gives a "seaman" a negligence action against his employer, but does not explicitly define the key term "seaman." This case addresses whether that term is limited to "blue-water seamen," who are employed on traditional ocean-going

vessels, or whether it also includes "brown-water seamen," who work on other vessels, such as those plying lakes, rivers, canals, and harbors.

Respondent Healy Tibbitts Builders, Inc.,[1] hired petitioner Robert Cabral on August 15, 1994, *see* R. 12, 72-74,[2] to operate the crane on Barge 538, a "crane barge," on a construction project in Pearl Harbor, Hawaii.[3] Petitioner's work involved removing and replacing the Ford Island Ferry "mooring dolphins," which are timber piles driven into the bottom of the harbor to cushion the ferry during landing. *See* R. 76. While so employed, petitioner spent more than ninety percent of his work time aboard Barge 538. *See* R. 75 (testimony of Richard A. Heltzel, respondent's vice-president).

On September 26, 1994, petitioner was injured on Barge 538 in the course of his employment. *See* R. 1, 3-6. He sued respondent under the Jones Act. Claiming to be a "seaman" as a matter of law, he sought summary judgment on the issue, and respondent cross-moved for summary judgment. As most of the requisites for seaman status were clearly established, the litigation below focused on only two issues: whether Barge 538 was a

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[1] Respondent's name is misspelled, as "Healy *Tibbits* Builders, Inc.," in the captions of the opinions below.

[2] Citations to Plaintiff-Appellant Robert A. Cabral's Excerpts of Record in the Ninth Circuit are cited with "R." and the page number.

[3] Respondent had previously employed petitioner for 10½ months ending May 31, 1994. *See* R. 11, 73. During the 2½ months between June 1, 1994, and August 14, 1994, petitioner had either worked for another employer or been unemployed. *See* R. 11, 62-63.

"vessel" and whether petitioner had a sufficient connection with it.

The district court, after a full discussion of the governing precedent, *see* App. C, *infra*, at 25a-28a, "assum[ed] without deciding" that Barge 538 was a "vessel," *id.* at 28a. But the court granted respondent's cross-motion for summary judgment, resting its conclusion that petitioner did not have the required connection with the vessel on two factors. First, the court looked to petitioner's "overall employment as a crane operator,"[4] rather than "the brief period" of his current employment with respondent, *id.* at 28a, and concluded that "[m]uch, if not most, of his work [other than his current employment] was done on land," *id.* at 28a-29a. On that view, petitioner's "connection with Barge 538 was at best transitory." *Id.* at 29a. Second, the court believed that "his work . . . in a sheltered harbor is hardly the sort of employment that would regularly expose him to the 'perils of the sea.' " *Id.* at 29a.

The Ninth Circuit affirmed. Without reaching the "vessel" question, *see* App. B, *infra*, at 20a n.1; *cf.* App. A, *infra*, at 11a n.2, the court of appeals agreed that petitioner did not have the requisite connection with Barge 538. In reaching its conclusion, the court relied on language from two of this Court's recent opinions, *Harbor Tug & Barge Co. v. Papai*, 117 S. Ct. 1535 (1997), and *Chandris, Inc. v. Latsis*, 515 U.S. 347 (1995), that discuss whether an employee goes "to sea." *See* App. B, *infra*, at

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[4] In particular, the court considered petitioner's 10½-month period of employment ending May 31, 1994. *See supra* note 3.

18a-19a; *cf.* App. A, *infra*, at 9a-10a. In particular, the *Papai* Court had declared that "the inquiry into the nature of the employee's connection to the vessel must concentrate on whether the employee's duties take him to sea." 117 S. Ct. at 1540. *See also Latsis*, *supra*, 515 U.S. at 370 ("The Jones Act remedy is reserved for sea-based maritime employees whose work regularly exposes them to 'the special hazards and disadvantages to which they who go down to sea in ships are subjected.' ") (quoting *Seas Shipping Co. v. Sieracki*, 328 U.S. 85, 104 (1946) (Stone, C.J., dissenting)). The Ninth Circuit read this language to refer to the high seas or the open sea, as opposed to the ocean harbor on whose waters petitioner worked. The Ninth Circuit accordingly denied petitioner's seaman status as a matter of law because he "present[ed] no evidence showing that he was ever aboard Barge 538 when it was anywhere but the Ford Island Ferry project." App. B, *infra*, at 19a; *cf.* App. A, *infra*, at 10a.

On petition for rehearing, the Ninth Circuit amended its opinion slightly to correct an obvious error, *see* App. A, *infra*, at 2a-3a, but otherwise adhered to its original views.

REASONS FOR GRANTING THE PETITION

The court of appeals erred on a recurring and significant issue of law on which the federal courts of appeals and state courts are divided. Contrary to the Ninth Circuit's holding, a worker need not work on the high seas to qualify as a seaman under the Jones Act. This Court has held on numerous occasions that crew members of

vessels plying inland navigable waters are entitled to seaman status under the Jones Act. Both before and after this Court's recent decisions in *Latsis* and *Papai*, the courts of appeals and state courts of last resort have routinely recognized that a worker's status as a seaman is not adversely affected simply because his vessel is not deployed on the high seas. The Ninth Circuit's contrary holding creates a different rule for the West Coast of the United States on a matter of significance for tens of thousands of brown-water seamen and for their employers, who must procure different insurance depending on the locations of their work force. Accordingly, plenary review is warranted.

THE NINTH CIRCUIT'S DECISION CONFLICTS WITH PRIOR DECISIONS OF THIS COURT, WITH COURT OF APPEALS' DECISIONS IN OTHER CIRCUITS, AND WITH DECISIONS OF STATE COURTS

Supreme Court Precedent

This case turns on the requirement announced in *Latsis, supra*,[5] that "a seaman must have a connection to a vessel in navigation . . . that is substantial in terms of both its duration and its nature."[6] 515 U.S. at 368. During

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[5] In *Latsis*, this Court declared "that the essential requirements for seaman status are twofold." 515 U.S. at 368. The first requirement – that the employee's duties contributed to the function of the vessel or the accomplishment of its mission – is not at issue here. Respondent did not dispute that petitioner's duties operating the crane contributed to the function of the crane barge. *See* App. A, *infra*, at 7a.

[6] Whether Barge 538 was a vessel is not currently before the Court, because the Ninth Circuit did not reach the question. In

the relevant period of employment,[7] petitioner spent more than ninety percent of his work time aboard Barge 538 performing duties essential to the vessel's mission. In view of the thirty percent "rule of thumb" that this Court approved in *Latsis*, *id.* at 371, there is no legitimate basis for doubting that petitioner's connection with the vessel was substantial in duration. The court below evidently believed that "substantial in . . . nature" means work on the high seas. There is no precedent for that notion.

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any event, the district court was fully justified in attributing vessel status to Barge 538, which was functionally indistinguishable from the barge that this Court found to be a vessel in *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527 (1995).

[7] At the time the district court reached its decision, it may have been unclear what period of employment should be considered to determine the nature of petitioner's connection to Barge 538. *See supra* note 3. This may explain why that court considered his "overall employment as a crane operator." App. C, *infra*, at 28a; *see supra* note 4 and accompanying text. After *Latsis* and *Papai*, however, it is clear that the court should have looked to the period of employment beginning August 15, 1994. *See, e.g., Papai, supra*, 117 S. Ct. at 1542 (describing the employee's prior work for the vessel owner during the 2½ months before his injury as "discreet engagements [that] were separate from the one in question"). As this Court explained in *Latsis*, "[i]f a maritime employee receives a new work assignment in which his essential duties are changed, he is entitled to have the assessment of the substantiality of his vessel-related work made on the basis of his activities in his new position." 515 U.S. at 372. Petitioner's assignment changed dramatically on August 15; indeed, because he had left respondent's employment entirely for 2½ months, he had to be rehired.

In elaborating on the seaman status test, this Court has made clear that an injured worker must be a "member[] of the crew of a vessel plying in navigable waters." *Swanson v. Marra Brothers, Inc.*, 328 U.S. 1, 7 (1946); *see also O'Donnell v. Great Lakes Dredge & Dock Co.*, 318 U.S. 36, 42-43 (1943) (noting the requirement of a "vessel plying in navigable waters"). Lower courts have continued to recognize and apply this requirement. *See, e.g., Reeves v. Mobile Dredging & Pumping Co.*, 26 F.3d 1247 (CA3 1994). It is the only requirement relating to location. Petitioner easily satisfies it, because Barge 538 was operating in the navigable waters of Pearl Harbor.

The Ninth Circuit's imposition of a far more restrictive location test was not only unwarranted, it was flatly inconsistent with a number of this Court's decisions. The *O'Donnell* Court paid the greatest attention to issues of location. In that case, a deckhand was injured on land while in the service of a vessel transporting sand on Lake Michigan. The Seventh Circuit had held that no recovery was available when the injury did not occur on navigable waters. Reversing, this Court held that the deckhand could recover under the Jones Act as a matter of law, notwithstanding that he was injured on land, because he was a member of the crew of a vessel that operated on navigable waters (albeit not the open sea). 318 U.S. at 42-43.

In at least[8] five other cases, this Court has recognized that seamen who never worked on the high seas were

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[8] In *Braen v. Pfeifer Transportation Co.*, 361 U.S. 129 (1959), the Court held that the mate on a barge was entitled to recover under the Jones Act. At the time of his injury, he was doing construction work while the barge was moored in an ocean

entitled to Jones Act coverage. Most recently, this Court upheld the potential availability of a Jones Act remedy for an injured employee who did all of his work on a barge in San Diego Harbor or on land. *See Southwest Marine, Inc. v. Gizoni*, 502 U.S. 81 (1991).[9] This result follows a long line of cases. In *Warner v. Goltra*, 293 U.S. 155 (1934), the Court held that the master of a river tugboat who had been killed on the Ohio River was a Jones Act seaman. In *Norton v. Warner Co.*, 321 U.S. 565 (1944), a boatman on a barge that "never went to sea but was confined in its operation to waters within a radius of thirty miles of Philadelphia," *id.* at 567, was found to be a seaman entitled to recover under the Jones Act. In *Senko v. LaCrosse Dredging Corp.*, 352 U.S. 370 (1957), this Court affirmed a jury finding that a Jones Act plaintiff was a member of the crew of a dredge that was anchored to the Illinois shore of the Mississippi River "during all the time petitioner worked for [the vessel owner]." *Id.* at 372; *see also id.* at 376 (Harlan, J., dissenting) (the plaintiff "never even saw [the dredge] being moved"). And in *Butler v. Whiteman*, 356 U.S. 271 (1958) (per curiam), the Court held that a jury could decide the seaman status of a crewman on a Mississippi River tug.

The use of phrases such as "perils of the sea," going "to sea," and "sea-based employees" in *Papai* and *Latsis*

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harbor. The published opinions do not reveal whether the barge (or the injured worker) ever went on the open sea.

[9] In its original opinion, the court below overlooked *Gizoni*. *See* App. A, *infra*, at 2a-3a; *compare* App. A, *infra*, at 6a & n.1 *with* App. B, *infra*, at 15a.

could not have been intended to overrule *O'Donnell, Gizoni, Warner v. Goltra, Norton v. Warner Co., Senko,* and *Butler*. In this context, "sea" is simply a convenient shorthand for "navigable waters." Indeed, this Court has regularly used "sea" when all navigable waters must have been intended. *See, e.g., Latsis, supra,* 515 U.S. at 364 (characterizing the *Gizoni* worker's time in San Diego Harbor as "time at sea"); *id.* at 373 (contrasting "out of navigation" with "at sea" in the context of holding that a six-month period in drydock may be time "in navigation"). This usage goes back to the early Jones Act cases. In *Warner v. Goltra, supra,* for example, the Court mentioned a definition of "a seaman" as "one who lives his life upon the sea" in the context of the master of a river tugboat. 293 U.S. at 157. (This language was quoted in *Latsis, supra,* 515 U.S. at 355.) In contrast, when the *Papai* or *Latsis* Court meant to limit the meaning of the term "sea" in the manner suggested by the Ninth Circuit, it used a phrase such as "the high seas," *Papai, supra,* 117 S. Ct. at 1543, or "the open sea," *Latsis, supra,* 515 U.S. at 351. *Cf. id.* at 356 (noting that a "blue-water seaman" is at one end of a broad spectrum, and recognizing that others on that spectrum are still entitled to "seaman" status) (quoting *Brown v. ITT Rayonier, Inc.,* 497 F.2d 234, 236 (CA5 1974)).

In summary, petitioner is not seeking a novel expansion of Jones Act coverage. He is simply seeking the restoration of the traditional understanding of seaman status that this Court has recognized in opinions stretching over almost sixty years. At the very least, petitioner's status is a fact question that should have been decided at trial rather than on summary judgment. *See, e.g., Latsis,*

supra, 515 U.S. at 369; *Gizoni, supra*, 502 U.S. at 92; *McDermott International, Inc. v. Wilander*, 498 U.S. 337, 356 (1991); *Senko, supra*, 352 U.S. at 374.

Circuit Court Precedent

The Ninth Circuit's decision conflicts with decisions in virtually all of the other circuits, which do not require an injured employee to work on the high seas to qualify for seaman status. *See, e.g., Bennett v. Perini Corp.*, 510 F.2d 114, 115-17 (CA1 1975) (seaman status question should have gone to the jury; the injured employee's work was confined to a bridge construction project in Narragansett Bay); *Tonnesen v. Yonkers Contracting Co.*, 82 F.3d 30 (CA2 1996) (reversing summary judgment for the employer; the injured employee worked on a stationary barge on a bridge construction project in Jamaica Bay); *Tyndall v. Conduit & Foundation Corp.*, 269 F.2d 947 (CA3 1959) (affirming recovery; injured employee worked on the Delaware River and other "navigable streams" on bridge-building and dredging projects); *Summerlin v. Massman Const. Co.*, 199 F.2d 715, 715-16 (CA4 1952) (holding the plaintiff to be a seaman as a matter of law; work was confined to a floating derrick on a bridge construction project on the York River); *Ducote v. V. Keeler & Co.*, 953 F.2d 1000 (CA5 1992) (reversing summary judgment for the employer; the injured employee worked on a spud barge on a piledriving project on the Red River); *Petersen v. Chesapeake & Ohio Ry.*, 784 F.2d 732, 737-38 (CA6 1986) (affirming recovery; injured employee worked on car ferries sailing on the Great Lakes); *Kelley v. Sun Transportation Co.*, 900 F.2d 1027 (CA7 1990) (affirming recovery; injured employee worked on a towboat on the Missouri

River); *Slatton v. Martin K. Eby Const. Co.*, 506 F.2d 505 (CA8 1974) (affirming recovery; injured employee worked on a barge constructing a "dolphin" on the Arkansas River), *cert. denied*, 421 U.S. 931 (1975); *Self v. Great Lakes Dredge & Dock Co.*, 832 F.2d 1540 (CA11 1987) (affirming recovery; injured employee worked on a dredge and barge in the St. Johns River), *cert. denied*, 486 U.S. 1033 (1988).

All of these modern cases take for granted the absence of a "high seas" requirement, because the issue was settled over a century ago in a pre-Jones Act case.[10] In *Saylor v. Taylor*, 77 F. 476 (CA4 1896), the employees on a "stream dredge," which was engaged in cleaning and deepening the channels in two Virginia creeks, claimed seaman status. The Fourth Circuit specifically considered whether it should "class the deck hands of a mud dredge in the quiet waters of a Potomac creek with the bold and skillful mariners who breast the angry waves of the Atlantic." *Id.* at 479. The court held that "those who are employed upon a vessel in any capacity, however humble, and whose labor contributes in any degree, however slight to the accomplishment of the main object in which the vessel is engaged, are clothed by the law with the legal rights of mariners. . . . " *Ibid. See also, e.g., The Bouker No. 2*, 241 F. 831, 833 (CA2) (Hough, J.) ("an engineer, *even*

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[10] Early cases are still authoritative on the meaning of the Jones Act. As this Court held in *McDermott International, Inc. v. Wilander*, 498 U.S. 337, 342 (1991), when Congress used the term "seaman" in the statute it intended the same meaning that admiralty courts had previously given to the term.

on a harbor tugboat, is a seaman") (emphasis added), *cert. denied*, 245 U.S. 647 (1917).

Except in the Ninth Circuit, no other court has read *Papai* and *Latsis* to alter this well-established doctrine. The continuing validity of the rule announced in *Saylor v. Taylor* is illustrated by the decisions since *Papai* and *Latsis* in which federal courts have adhered to the doctrine and upheld seaman status for brown-water seamen. *See, e.g., Tonnesen v. Yonkers Contracting Co.*, 82 F.3d 30 (CA2 1996) (reversing summary judgment for the employer; the injured employee worked on a stationary barge on a bridge construction project in Jamaica Bay); *Moyer v. Johnson Brothers Corp.*, 1997 U.S. Dist. LEXIS 14683, 1997 WL 582820 (E.D. La., Sept. 19, 1997) (No. CIV. A. 96-885) (denying employer's motion for summary judgment; injured employee worked on barges in bridge construction projects).

State Court Precedent

Consistent with *Saylor v. Taylor*, state courts of last resort have regularly recognized that Jones Act coverage is available to those who do not work on the high seas. Perhaps the most striking example can be found in a recent decision of the Louisiana Supreme Court, which held that an employee on an "airboat" operating on marshland near Sulphur, Louisiana (over 30 miles inland from the Gulf of Mexico), could qualify for seaman status. *See Coleman v. Robicheaux Airboats, Inc.*, 662 So.2d 452 (La. 1995) (per curiam) (reversing 657 So.2d 1331 (La. App. 1995)).

State courts of last resort have similarly protected crewmen, such as petitioner here, who worked on vessels in ocean harbors. *See, e.g., Arundel Corp. v. Jasper*, 219 Md. 519, 150 A.2d 415 (1959) (affirming recovery; injured employee worked on a dredge only in Baltimore Harbor); *Toland v. Atlantic Gahagan Joint Venture Dredge*, 57 N.J. 205, 271 A.2d 2 (1970) (per curiam) (affirming intermediate appellate court's reversal of summary judgment for the employer; injured employee worked on a dredge in Newark Bay); *B-R Dredging Co. v. Rodriguez*, 564 S.W.2d 693 (Tex. 1978) (affirming recovery; injured employee worked on a tender boat in support of a dredge in the Corpus Christi ship channel); *Weeks Marine v. Gillikin*, 247 Va. 89, 439 S.E.2d 341 (1994) (remanding for trial on other issues, but recognizing seaman status of an employee on a work boat in a harbor dredging project).

Brown-water seamen on the nation's lakes and rivers have also been held to be Jones Act "seamen" in the state courts of last resort. *See, e.g., Allen v. Mobile Interstate Piledrivers*, 475 So.2d 530 (Ala. 1985) (reversing NOV judgment for the employer; injured employee worked from a river barge on bridge construction projects); *American Barge Line Co. v. Leatherman's Adm'x*, 306 Ky. 284, 206 S.W.2d 955 (1947) (affirming recovery; injured employee worked on a river boat); *Russell v. Pere Marquette Ry. Co.*, 245 Mich. 624, 223 N.W. 230 (1929) (affirming recovery; injured employee worked on a Lake Michigan car ferry), *cert. denied*, 279 U.S. 864 (1929); *Brannan v. Great Lakes Dredge & Dock Co.*, 253 Minn. 28, 91 N.W.2d 166 (1958) (reversing directed verdict for the employer; injured employee worked on dredges on the Great Lakes); *Pedersen v. Manitowoc Co.*, 25 N.Y.2d 412, 418-19, 255 N.E.2d

146, 149-50 (1969) (reinstating trial court's judgment for the plaintiffs, which had been reversed by the intermediate appellate court; injured employees worked from a crane barge anchored in the Hudson River for a bridge construction project); *Brown v. L. A. Wells Constr. Co.*, 143 Ohio St. 580, 585-86, 56 N.E.2d 451, 454-55 (Ohio 1944) (affirming intermediate appellate court's reversal of directed verdict for the employer; injured employee worked on a drill scow on Lake Eire); *Rankin v. Iron City Sand & Gravel Corp.*, 356 Pa. 548, 52 A.2d 455 (1947) (affirming recovery; injured employee worked on a river tow boat); *Indiana & Michigan Electric Co. v. Workers' Compensation Commissioner*, 184 W. Va. 673, 403 S.E.2d 416 (W. Va. 1991) (holding that "a chief engineer . . . responsible for maintaining the engines of motor vessels that transport coal barges along the Ohio and Kanawha Rivers" cannot pursue a workers' compensation claim because he is a Jones Act seaman).

This conflict is particularly serious in the states of the Ninth Circuit, where the risks of state/federal forum-shopping[11] compound the general problems created when different courts provide different remedies to similarly situated plaintiffs bringing their actions under the

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[11] The "saving to suitors" clause, 28 U.S.C. § 1333(1), guarantees injured seamen access to state courts. Once filed in state court, Jones Act actions are not removable to federal court. *See, e.g., Lackey v. Atlantic Richfield Co.*, 990 F.2d 202, 207 (CA5 1993) ("It is axiomatic that Jones Act suits may not be removed from state court because 46 U.S.C. App. § 688 (the Jones Act) incorporates the general provisions of the Federal Employers' Liability Act, including 28 U.S.C. § 1445(a), which in turn bars removal.").

same federal statute. In California, where there are more maritime workers than in the rest of the states of the Ninth Circuit combined,[12] the state supreme court long ago recognized that a maritime worker can qualify for seaman status without going on the high seas. In *Sanguinetti v. Moore Dry Dock Co.*, 36 Cal.2d 812, 228 P.2d 557 (1951), an injured employee spent 40% of his work time on land and 60% on a tugboat in the Oakland Estuary and elsewhere in San Francisco Bay. The court summarily rejected the defendant's contention that the employee was not a seaman. *Id.* at 814-15, 228 P.2d at 558-59. In more recent years, the California appellate courts have regularly held seamen entitled to recover under the Jones Act or permitted seaman status issues to go to the jury when the plaintiff did not work on the high seas. In *Soucie v. Trautwein Brothers*, 275 Cal. App.2d 20, 79 Cal. Rptr. 671 (1969), the best-known of these cases, the court held that a "pile butt" who worked on a derrick barge constructing a seawall in Newport Harbor was a seaman as a matter of law. The only location requirement was that the "barge [was] a vessel . . . operating and working in navigable waters." *Id.* at 26, 79 Cal. Rptr. at 675.

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[12] *Compare* BUREAU OF THE CENSUS, DEP'T OF COMMERCE, COUNTY BUSINESS PATTERNS 1995: CALIFORNIA 1 (1997) (reporting 17,112 "water transportation" workers in California) *with, e.g.*, COUNTY BUSINESS PATTERNS 1995: WASHINGTON 1 (1997) (7,985 water transportation workers); COUNTY BUSINESS PATTERNS 1995: HAWAII 1 (1997) (3,816 water transportation workers); COUNTY BUSINESS PATTERNS 1995: OREGON 1 (1997) (2,398 water transportation workers); COUNTY BUSINESS PATTERNS 1995: ALASKA 1 (1997) (1,792 water transportation workers).

The situation is similar in other West Coast states. In Oregon, for example, the state supreme court held in *Kinney v. General Construction Co.*, 248 Or. 500, 435 P.2d 297 (1967), that a deckhand on a tug moving a barge as part of a river dredging project was entitled to recover under the Jones Act. The lower courts have since consistently permitted brown-water seamen to recover under the Jones Act. *See, e.g., Gaussoin v. Port of Portland*, 144 Or. App. 247, 927 P.2d 601 (1996) (affirming recovery; injured employee was a deckhand on a tug in the Port of Portland – almost 100 miles upstream from the Pacific Ocean); *Watson v. Puget Sound Tug & Barge Co.*, 96 Or. App. 79, 771 P.2d 307 (1989) (affirming recovery; injured employee was a deckhand on tugboats and barges on the Columbia River), *rev. denied*, 308 Or. 315, 779 P.2d 618 (1989); *Veberes v. Knappton Corp.*, 92 Or. App. 378, 759 P.2d 279 (1988) (affirming recovery; injured employee was a deckhand on a Columbia River tugboat), *rev. denied*, 307 Or. 78, 763 P.2d 732 (1988). In Washington, the state supreme court has recognized a waitress on a Puget Sound ferry boat, *Gross v. Washington State Ferries*, 59 Wash.2d 241, 367 P.2d 600 (1961), and a fisherman working on a river and the bay at its mouth, *Pryal v. Mardesich*, 51 Wash.2d 663, 321 P.2d 269 (1958), as Jones Act seamen.

No state court has read *Papai* and *Latsis* to establish a "high seas" requirement. The continuing validity of the rule rejected by the Ninth Circuit is illustrated by the state court decisions since *Papai* and *Latsis* that have adhered to the well-established doctrine and upheld seaman status for brown-water seamen. *See, e.g., Coleman v. Robicheaux Airboats, supra; Wall v. Progressive Barge Line*, ___ So.2d ___, 1997 La. App. LEXIS 2670, 1997 WL 680790

(La. App., Oct. 29, 1997) (No. 97-CA-0665) (affirming the recovery of the captain of an inland harbor tug); *Maddox v. Omni Drilling Corp.*, 698 So.2d 1022, 1025-26 (La. App. 1997) (holding that a support boat driver on waterways in the Sabine National Wildlife Refuge is a seaman); *Markle v. Cement Transit Co.*, ___ N.E.2d ___, 1997 Ohio App. LEXIS 4252, 1997 WL 578940 (Ohio App., Sept. 18, 1997) (No. 70175) (reversing summary judgment for the employer; injured employee was a cook on a Great Lakes vessel); *Hill v. Workmen's Compensation Appeal Board*, 703 A.2d 74 (Pa. Commw. Ct. 1997) (holding that a deck hand on a restaurant cruise vessel operating on the waters of the Delaware River was covered by the Jones Act).

THE NINTH CIRCUIT'S DECISION WILL HAVE A SERIOUS IMPACT ON THE OVERWHELMING MAJORITY OF U.S. SEAMEN, ON THEIR EMPLOYERS, AND ON THE DEPARTMENT OF LABOR

It is important for this Court to address the Ninth Circuit's "high seas" requirement and resolve the conflicts discussed here immediately, for the decision below will have a serious impact on the overwhelming majority of U.S. seamen, on their employers, and on the Department of Labor.

The Impact on U.S. Seamen

The decision below creates grave uncertainties for American seamen. Injured seamen are entitled to sue their negligent employers under the Jones Act. Other

injured maritime workers generally have a workers' compensation remedy against their employers, without regard to fault, under the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. §§ 901-50. These two remedies are mutually exclusive. *See, e.g., Latsis, supra,* 515 U.S. at 355-56; *Gizoni, supra,* 502 U.S. at 88; *Wilander, supra,* 498 U.S. at 347; *Swanson, supra,* 328 U.S. at 7. Thus it is particularly important for the courts to provide clear guidance on seaman status, the requirement that distinguishes the two, lest " 'the perils of judicial review,' " *Latsis, supra,* 515 U.S. at 356 (quoting G. GILMORE & C. BLACK, THE LAW OF ADMIRALTY, § 6-1, at 272 (2d ed. 1975)), undermine the remedies that Congress has provided. For three decades, this Court left the task entirely to the lower courts, and the result was " 'a labyrinth.' " *Ibid.* (quoting *Johnson v. John F. Beasley Const. Co.,* 742 F.2d 1054, 1060 (CA7 1984), *cert. denied,* 469 U.S. 1211 (1985)). *Wilander* began the process of restoring order to the field, but the decision below shows that the task is not yet done. Taking language from *Latsis* and *Papai* out of context, the Ninth Circuit has reintroduced serious confusion.

The Ninth Circuit's high seas requirement has a particularly far-reaching impact, for today the overwhelming majority of U.S. seamen would not satisfy this requirement. Since the end of World War II, the number of "blue-water" seamen in the United States has steadily declined from almost 158,900 in 1945, *see* W. LOVETT (ed.), UNITED STATES SHIPPING POLICIES AND THE WORLD MARKET 159 (1996) (table 6.1), to 7,500 in 1992, *see* BUREAU OF THE CENSUS, DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 1997, at 660 tbl. 1075 (117th ed. 1997). In 1994,

however, the Bureau of Labor Statistics reported that there were about 48,000 "water transportation workers" – a category that includes seamen, deckhands, and marine oilers; captains and pilots; engineers; and mates and deck officers – on vessels plying the oceans, Great Lakes, harbors, rivers, canals, and other waterways.[13] *See* BUREAU OF LABOR STATISTICS, DEP'T OF LABOR, OCCUPATIONAL OUTLOOK HANDBOOK, 1996-97 EDITION 458-59 (Bulletin 2470, Feb. 1996). Thus we can see that only about fifteen percent of the nation's seamen fit the Ninth Circuit's mold. Under the decision below, the remaining eighty-five percent would lose their Jones Act benefits – benefits that Congress intended them to have and benefits that the courts have traditionally awarded to them.

The Impact on Employers

The decision below similarly creates commercially unacceptable uncertainties for those who employ seamen. Just as it is important for employees to know the remedies available to them, it is important for employers to know their responsibilities so that they can obtain appropriate insurance. Under the decision below,

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[13] The Bureau of Labor Statistics recognizes that this is a low estimate because many seamen (particularly those who work on the Great Lakes) do not work year-round. *See* BUREAU OF LABOR STATISTICS, DEP'T OF LABOR, OCCUPATIONAL OUTLOOK HANDBOOK, 1996-97 EDITION 458 (Bulletin 2470, Feb. 1996). Furthermore, the Bureau's cited category does not include many brown-water workers who would qualify as "seamen" outside of the Ninth Circuit. *See, e.g., id.* at 473 (11,000 "riggers" employed in 1994); *Gizoni, supra* (recognizing that a "rigging foreman" can qualify as "seaman").

employers that do business both on the West Coast and elsewhere in the country will need to arrange differing coverages for different workers depending on where the workers are assigned. The conflict between state and federal courts in some of the states of the Ninth Circuit, *see supra* at 15-17, will require employers in those states to arrange double coverage for brown-water seamen. These employers will be unable to predict which remedy a particular worker will successfully pursue until the worker files suit in state court (relying on the Jones Act) or demands LHWCA benefits (with potential judicial review in federal court). Because the Jones Act is more beneficial to injured employees in some contexts and the LHWCA in others, either option is a real possibility (depending on the facts of the case) and the employer must insure for both.

It is particularly important for employers to be able to predict whether any of their workers may be eligible for LHWCA benefits because the Act requires covered employers to "secure the payment of compensation," generally by obtaining insurance. *See* 33 U.S.C. § 932(a). Both the employer and senior corporate officers are subject to criminal penalties for violating this requirement. *See* 33 U.S.C. § 938(a); 20 C.F.R. § 703.003(a). Thus employers who rely on the traditional understanding of seaman status and fail to obtain LHWCA insurance coverage for their brown-water seamen employees risk serious fines; their senior corporate officers risk fines and imprisonment.

The Impact on the Department of Labor

The Secretary of Labor is responsible for administering LHWCA. *See* 33 U.S.C. § 939. The Secretary has delegated these responsibilities to the Director of the Office of Workers' Compensation Programs (OWCP), who administers the Act pursuant to regulations codified at 20 C.F.R. pts. 701-04. Because the Jones Act and LHWCA are mutually exclusive, the Ninth Circuit's decision severely restricting eligibility for Jones Act coverage will correspondingly expand eligibility for LHWCA coverage. According to the Maritime Administration, in fiscal year 1995 there were an average of just under 22,500 longshore workers and just under 49,000 shipyard production workers (most of whom would presumably qualify for LHWCA coverage). *See* MARITIME ADMINISTRATION, DEP'T OF TRANSPORTATION, ANNUAL REPORT 1995, table 19 (1996). If more than 40,000 brown-water seamen were added to these totals, the population with LHWCA coverage would increase by more than fifty percent. Thus if the decision below is allowed to stand, West Coast OWCP district offices can expect to see their workload increase by over fifty percent as thousands of additional cases are governed by LHWCA rather than the Jones Act.

The Department of Labor also has a strong interest in the proper administration of the statutory scheme that Congress has established to provide compensation for injured maritime workers. The Ninth Circuit's novel requirement would not only shift over 40,000 workers out of Jones Act coverage and into LHWCA coverage, it would put over 40,000 workers into coverage that Congress did not intend them to have. In administering the LHWCA, the Department is charged with giving effect to

Congress's intent. The decision below interferes with that mission.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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February 12, 1998

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ROBERT CABRAL, *Plaintiff-Appellant,* v. HEALY TIBBITS BUILDERS, INC., *Defendant-Appellee.*	No. 95-16476 D.C. No. CV-95-00126-SPK ORDER AMENDING OPINION AND DENYING THE PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC AND AMENDED OPINION

Appeal from the United States District Court
for the District of Hawaii
Samuel P. King, Senior District Judge, Presiding

Argued and Submitted
December 9, 1996 – San Francisco, California

Filed July 8, 1997
Amended October 15, 1997

Before: Betty B. Fletcher, Charles Wiggins,
Thomas G. Nelson, Circuit Judges.

Opinion by Judge Wiggins

COUNSEL

Christopher P. McKenzie, Honolulu, Hawaii, for the plaintiff-appellant.

Michael Formby, Alcantara & Frame, Honolulu, Hawaii, for the defendant-appellee.

ORDER

The opinion filed July 8, 1997, slip opinion number 7877 and appearing at 118 F.3d 1363, is amended as follows:

1. At slip op. 7881, line 27, replace "three" with "four".

2. At slip op. p. 7881, line 28, add footnote after "law.":

See McDermott Int'l, Inc. v. Wilander, 498 U.S. 337, 356-7 (1991) (holding that one need not aid in the navigation of a vessel in order to qualify as a seaman under the Jones Act); *Southwest Marine, Inc. v. Gizoni*, 502 U.S. 81, 92 (1991) (holding that a ship repairman employed at a shipyard is not limited to a remedy under the LHWCA as a matter of law if genuine issues of fact exist as to whether the worker was also a seaman under the Jones Act due to an employment-related connection to a vessel in navigation); *Chandris, Inc. v. Latsis*, 115 S. Ct. 2172, 2190-2192 (1995) (setting forth a two-prong test for seaman status designed to separate sea-based maritime workers from land-based employees); *Harbor Tug & Barge Co. v. Papai*, 117 S. Ct. 1535, 1541 (1997) (applying the

Latsis test and holding that a showing of common ownership or control is required when evaluating the plaintiff's employment-related connection to a vessel in navigation).

3. Page 7881, line 30, replace "second" with "third".

With these amendments, the panel has voted unanimously to deny the petition for rehearing and Judges Fletcher and T.G. Nelson vote to reject the suggestion for rehearing en banc and Judge Wiggins so recommends.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.

Defendant-appellee Healy Tibbitts Builders' motion to strike plaintiff's petition for rehearing is DENIED.

OPINION

WIGGINS, Circuit Judge:

Robert Cabral was injured while he was working as a crane operator aboard a crane barge on a construction project in Pearl Harbor. He sued his employer under the Jones Act. The district court granted summary judgment in favor of his employer on the ground that Cabral was not a "seaman" under the Jones Act. Cabral appeals. We have jurisdiction under 28 U.S.C. § 1291. We affirm the district court's judgment for the reasons set forth below.

BACKGROUND

From July 14, 1993 to May 31, 1994, Cabral was employed by Healy Tibbits Builders, Inc. ("Healy"). Cabral worked on a variety of land-based and sea-based projects during this period. From June 1, 1994 to August 14, 1994, Cabral did not work for Healy. On August 15, 1994, Healy hired Cabral to work as the crane operator for a Healy construction project at the Ford Island Ferry in Pearl Harbor. The project involved removing and replacing "mooring dolphins" at the ferry. A mooring dolphin is a timber pile driven into the bottom of the harbor that cushions the ferry during landing.

Cabral was assigned to operate the crane aboard Barge 538. Between August 15, 1994 and the date of the accident, Cabral spent approximately ninety percent of his work time aboard Barge 538 operating the vessel's crane. Barge 538 is approximately 160 feet long and 50 feet wide. It has a raked bow and stern, drawing about five feet of water at the stern and four at the bow. Although the barge is not self-propelled, it can be moved up to 500 feet by manipulating its anchor lines. The United States Coast Guard inspects Barge 538 annually to ensure seaworthiness and compliance with safety standards. The barge has been used on various construction projects throughout the Honolulu area and as far away as the Philippines. Although Barge 538 can serve other purposes, it is primarily a crane barge. To serve that primary purpose, it has a 360-degree, 125 foot crane permanently welded to its deck.

On the weekend of September 24 and 25, 1994, Barge 538 was temporarily relocated to another part of the

harbor to take soil samples. This soil sampling project did not require the use of the barge's crane, so Cabral was not aboard. The barge was returned to the Ford Island project on the afternoon of the 25th. When Cabral reported for work on the morning of Monday, September 26, 1994, he slipped and fell on the barge's gangway, suffering an injury to his lower back. He brought this action under the Jones Act against Healy.

The district court granted summary judgment in Healy's favor, holding that Cabral was not entitled to "seaman" status because his connection with Barge 538 "was at best transitory." Accordingly, the district court entered judgment in favor of Healy on Cabral's complaint.

DISCUSSION

We review *de novo* the district court's order granting summary judgment in favor of Healy. *Warren v. City of Carlsbad*, 58 F.3d 439, 441 (9th Cir. 1995), *cert. denied*, 116 S. Ct. 1261 (1996). We must determine, viewing the evidence in the light most favorable to Cabral, whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law. *Id.* Whether Cabral was a seaman when he slipped and fell on Barge 538's gangway is a mixed question of law and fact. *Boy Scouts of Am. v. Graham*, 86 F.3d 861, 864 (9th Cir. 1996). Nevertheless, summary judgment is mandated where the facts and the law will reasonably support only one conclusion regarding Cabral's seaman status. *McDermott Int'l, Inc. v. Wilander*, 498 U.S. 337, 356 (1991).

The Jones Act provides a cause of action to any "seaman" who suffers personal injuries in the course of his employment. *See* 46 U.S.C. app. § 688. Unfortunately, what seems a fairly simple inquiry – whether a particular employee is a "seaman" for purposes of the Jones Act – has been anything but for the various federal courts which have grappled with the issue, including our own. With the Supreme Court's recent decision in *Harbor Tug & Barge Co. v. Papai*, 117 S. Ct. 1535 (1997), the Jones Act "seaman" inquiry has reached our nation's highest court four times already this decade, a remarkable record for any area of the law.[1]

We begin our attempt to navigate the perils of the "seaman" inquiry with the third of these cases, *Chandris, Inc. v. Latsis*, 115 S. Ct. 2172 (1995) ("*Latsis*"). There, the Supreme Court formulated a two-part test for determining whether an employee should be treated as a "seaman" under the Jones Act:

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[1] *See McDermott Int'l, Inc. v. Wilander*, 498 U.S. 337, 356-57 (1991) (holding that one need not aid in the navigation of a vessel in order to qualify as a seaman under the Jones Act); *Southwest Marine, Inc. v. Gizoni*, 502 U.S. 81, 92 (1991) (holding that a ship repairman employed at a shipyard is not limited to a remedy under the LHWCA as a matter of law if genuine issues of fact exist as to whether the worker was also a seaman under the Jones Act due to an employment-related connection to a vessel in navigation); *Chandris, Inc. v. Latsis*, 115 S. Ct. 2172, 2190-2192 (1995) (setting forth a two-prong test for seaman status designed to separate sea-based maritime workers from land-based employees); *Harbor Tug & Barge Co. v. Papai*, 117 S. Ct. 1535, 1541 (1997) (applying the *Latsis* test and holding that a showing of common ownership or control is required when evaluating the plaintiff's employment-related connection to a vessel in navigation).

> [T]he essential requirements for seaman status are twofold. First, as we emphasized in *Wilander*, "an employee's duties must 'contribut[e] to the function of the vessel or to the accomplishment of its mission.' " . . . Second, . . . a seaman must have a *connection* to a vessel in navigation (or to an identifiable group of such vessels) that is *substantial* in terms of both its duration and its nature.

Latsis, 115 S. Ct. at 2190 (quoting *Wilander*, 498 U.S. at 355) (emphases added). The Court explained that the latter requirement was designed to separate sea-based maritime workers from land-based employees "who have only a transitory or sporadic connection to a vessel in navigation, and therefore whose employment does not regularly expose them to the perils of the sea." *Id.*

Healy does not dispute that Cabral meets the first part of this test; Cabral's duties as a crane operator unquestionably contribute to Barge 538's function as a crane barge. We turn, then, to the second part of the *Latsis* test, and consider whether Cabral had a connection that was substantial in terms of duration and nature to a vessel in navigation.

Assuming that Barge 538 was a vessel in navigation, the district court concluded that Cabral's connection with Barge 538 was not substantial in terms of duration and nature. The district court emphasized that Cabral's assignment to Barge 538 was temporary, noting that the barge was simply a platform upon which he happened to be performing his work as a crane operator. As a result, the district court granted summary judgment in Healy's favor.

In *Papai*, the Supreme Court had to decide whether summary judgment should be granted against a Jones Act plaintiff who had been hired to perform a one-day painting job aboard the defendant's tugboat. John Papai was hired out of a union hiring hall by the owner of the *Point Barrow* to do a one-day painting job on the tug's housing structure. While he was painting, he injured his knee when he fell from a ladder. Papai had worked for the *Point Barrow*'s owner on twelve previous occasions in the two-and-a-half months before his injury. The district court granted summary judgment in favor of the tugboat's owner, concluding that Papai was not a seaman within the meaning of the Jones Act.

A divided panel of our court reversed. The panel majority held that the relevant inquiry was "not whether plaintiff had a permanent connection with the vessel [but] whether plaintiff's relationship with a vessel (or group of vessels) was substantial in terms of duration and nature, which requires consideration of the total circumstances of his employment." *Papai v. Harbor Tug & Barge Co.*, 67 F.3d 203, 206 (9th Cir. 1995). The panel majority concluded that the group of employers who hired workers out of the union hall could be considered a common employer for purposes of determining a worker's seaman status. As a result, the panel majority held that "all the circumstances surrounding the work performed by plaintiff for defendant as a deckhand prior to (and after, if any) the accident, as well as work performed for other employers during the relevant time period should be considered in making the determination." *Id.* The panel majority then concluded that there were triable issues of fact as to whether the plaintiff had a

substantial connection with the vessels upon which he worked. *Id.*

The Supreme Court granted certiorari and reversed. Most of the Court's discussion focused on whether our majority decision properly allowed Papai to rely on work done for other employers; adopting the view of the dissent, the Court held that we misapplied *Latsis* by not requiring a showing of common ownership or control. *Papai*, 117 S. Ct. at 1541. However, as part of this discussion, the Court applied the two-part *Latsis* test to Papai's work aboard the *Point Barrow* and concluded that no reasonable jury could conclude that Papai was a seaman as a matter of law. The Court commented thusly on the "substantial connection" inquiry:

> For the substantial connection requirement to serve its purpose, the inquiry into the nature of the employee's connection to the vessel must concentrate on whether the employee's duties take him to sea. This will give substance to the inquiry both as to the duration and nature of the employee's connection to the vessel and be helpful in distinguishing land-based from sea-based employees.

Id. at 1540. Then, a few paragraphs later, after noting that Papai's work on the *Point Barrow* was not of a seagoing nature, the Court concluded that Papai's assignment to the *Point Barrow* on the day of the injury "was the sort of 'transitory or sporadic' connection to a vessel or group of vessels that . . . . does not qualify one for seaman status." *Id.* at 1542 (quoting *Latsis*, 115 S. Ct. at 2190).

For our present purposes, *Papai* and *Latsis* dictate that when we determine whether the nature of Cabral's

connection to Barge 538 is substantial, we should focus on whether Cabral's duties were primarily sea-based activities. In both cases, the Supreme Court emphasized that the purpose of the substantial connection test is to separate land-based workers who do not face the perils of the sea from sea-based workers whose duties necessarily require them to face those risks. *See Papai*, 117 S. Ct. at 1540 ("[T]he inquiry into the nature of the employee's connection to the vessel must concentrate on whether the employee's duties take him to sea."); *Latsis*, 115 S. Ct. at 2190 ("[T]he Jones Act remedy is reserved for sea-based maritime employees whose work regularly exposes them to 'the special hazards and disadvantages to which they who go down to sea in ships are subjected.' " (quoting *Seas Shipping Co. v. Sieracki*, 328 U.S. 85, 104 (1946) (Stone, C.J., dissenting))).

We conclude that the undisputed evidence shows that Cabral was a land-based worker who had only a transitory or sporadic connection with Barge 538. Cabral was hired to work on Barge 538 as a crane operator and not as a crew member. Cabral presents no evidence showing that he was ever aboard Barge 538 when it was anywhere but the Ford Island Ferry project. In fact, when the barge was used in another part of the harbor on a soil sampling project on the weekend immediately preceding the accident, Cabral was not aboard because the barge's crane was not used. Furthermore, Cabral presents no evidence showing that he would continue to work aboard Barge 538 after the Ford Island Ferry project was completed. All of the evidence points to one conclusion: that Cabral was a land-based crane operator who happened to be assigned to a project which required him to work

aboard Barge 538. In sum, we hold that the district court correctly concluded that there was no evidence from which a reasonable jury could infer that Cabral met the substantial connection test. As a result, we affirm the district court's judgment in favor of Healy.[2]

AFFIRMED.

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[2] Our conclusion that Cabral did not have a substantial connection with Barge 538 means we need not reach the issue of whether Barge 538 was a vessel in navigation. Thus, we express no opinion on this issue.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ROBERT CABRAL, *Plaintiff-Appellant,* v. HEALY TIBBITS BUILDERS, INC., *Defendant-Appellee.*	No. 95-16476 D.C. No. CV-95-00126-SPK OPINION

Appeal from the United States District Court
for the District of Hawaii
Samuel P. King, Senior District Judge, Presiding

Argued and Submitted
December 9, 1996 – San Francisco, California

Filed July 8, 1997

Before: Betty B. Fletcher, Charles Wiggins,
Thomas G. Nelson, Circuit Judges.

Opinion by Judge Wiggins

COUNSEL

Christopher P. McKenzie, Honolulu, Hawaii, for the plaintiff-appellant.

Michael Formby, Alcantara & Frame, Honolulu, Hawaii, for the defendant-appellee.

OPINION

WIGGINS, Circuit Judge:

Robert Cabral was injured while he was working as a crane operator aboard a crane barge on a construction project in Pearl Harbor. He sued his employer under the Jones Act. The district court granted summary judgment in favor of his employer on the ground that Cabral was not a "seaman" under the Jones Act. Cabral appeals. We have jurisdiction under 28 U.S.C. § 1291. We affirm the district court's judgment for the reasons set forth below.

BACKGROUND

From July 14, 1993 to May 31, 1994, Cabral was employed by Healy Tibbits Builders, Inc. ("Healy"). Cabral worked on a variety of land-based and sea-based projects during this period. From June 1, 1994 to August 14, 1994, Cabral did not work for Healy. On August 15, 1994, Healy hired Cabral to work as the crane operator for a Healy construction project at the Ford Island Ferry in Pearl Harbor. The project involved removing and replacing "mooring dolphins" at the ferry. A mooring dolphin is a timber pile driven into the bottom of the harbor that cushions the ferry during landing.

Cabral was assigned to operate the crane aboard Barge 538. Between August 15, 1994 and the date of the accident, Cabral spent approximately ninety percent of his work time aboard Barge 538 operating the vessel's crane. Barge 538 is approximately 160 feet long and 50 feet wide. It has a raked bow and stern, drawing about five feet of water at the stern and four at the bow.

Although the barge is not self-propelled, it can be moved up to 500 feet by manipulating its anchor lines. The United States Coast Guard inspects Barge 538 annually to ensure seaworthiness and compliance with safety standards. The barge has been used on various construction projects throughout the Honolulu area and as far away as the Philippines. Although Barge 538 can serve other purposes, it is primarily a crane barge. To serve that primary purpose, it has a 360-degree, 125 foot crane permanently welded to its deck.

On the weekend of September 24 and 25, 1994, Barge 538 was temporarily relocated to another part of the harbor to take soil samples. This soil sampling project did not require the use of the barge's crane, so Cabral was not aboard. The barge was returned to the Ford Island project on the afternoon of the 25th. When Cabral reported for work on the morning of Monday, September 26, 1994, he slipped and fell on the barge's gangway, suffering an injury to his lower back. He brought this action under the Jones Act against Healy.

The district court granted summary judgment in Healy's favor, holding that Cabral was not entitled to "seaman" status because his connection with Barge 538 "was at best transitory." Accordingly, the district court entered judgment in favor of Healy on Cabral's complaint.

DISCUSSION

We review *de novo* the district court's order granting summary judgment in favor of Healy. *Warren v. City of Carlsbad*, 58 F.3d 439, 441 (9th Cir. 1995), *cert. denied*, 116

S. Ct. 1261 (1996). We must determine, viewing the evidence in the light most favorable to Cabral, whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law. *Id.* Whether Cabral was a seaman when he slipped and fell on Barge 538's gangway is a mixed question of law and fact. *Boy Scouts of Am. v. Graham*, 86 F.3d 861, 864 (9th Cir. 1996). Nevertheless, summary judgment is mandated where the facts and the law will reasonably support only one conclusion regarding Cabral's seaman status. *McDermott Int'l, Inc. v. Wilander*, 498 U.S. 337, 356 (1991).

The Jones Act provides a cause of action to any "seaman" who suffers personal injuries in the course of his employment. *See* 46 U.S.C. app. § 688. Unfortunately, what seems a fairly simple inquiry – whether a particular employee is a "seaman" for purposes of the Jones Act – has been anything but for the various federal courts which have grappled with the issue, including our own. With the Supreme Court's recent decision in *Harbor Tug & Barge Co. v. Papai*, 117 S. Ct. 1535 (1997), the Jones Act "seaman" inquiry has reached our nation's highest court three times already this decade, a remarkable record for any area of the law.

We begin our attempt to navigate the perils of the "seaman" inquiry with the second of these cases, *Chandris, Inc. v. Latsis*, 115 S. Ct. 2172 (1995) (*"Latsis"*). There, the Supreme Court formulated a two-part test for determining whether an employee should be treated as a "seaman" under the Jones Act:

> [T]he essential requirements for seaman status are twofold. First, as we emphasized in *Wilander*, "an employee's duties must 'contribut[e] to the function of the vessel or to the accomplishment of its mission.' " . . . Second, . . . a seaman must have a *connection* to a vessel in navigation (or to an identifiable group of such vessels) that is *substantial* in terms of both its duration and its nature.

Latsis, 115 S. Ct. at 2190 (quoting *Wilander*, 498 U.S. at 355) (emphases added). The Court explained that the latter requirement was designed to separate sea-based maritime workers from land-based employees "who have only a transitory or sporadic connection to a vessel in navigation, and therefore whose employment does not regularly expose them to the perils of the sea." *Id.*

Healy does not dispute that Cabral meets the first part of this test; Cabral's duties as a crane operator unquestionably contribute to Barge 538's function as a crane barge. We turn, then, to the second part of the *Latsis* test, and consider whether Cabral had a connection that was substantial in terms of duration and nature to a vessel in navigation.

Assuming that Barge 538 was a vessel in navigation, the district court concluded that Cabral's connection with Barge 538 was not substantial in terms of duration and nature. The district court emphasized that Cabral's assignment to Barge 538 was temporary, noting that the barge was simply a platform upon which he happened to be performing his work as a crane operator. As a result, the district court granted summary judgment in Healy's favor.

In *Papai,* the Supreme Court had to decide whether summary judgment should be granted against a Jones Act plaintiff who had been hired to perform a one-day painting job aboard the defendant's tugboat. John Papai was hired out of a union hiring hall by the owner of the *Point Barrow* to do a one-day painting job on the tug's housing structure. While he was painting, he injured his knee when he fell from a ladder. Papai had worked for the *Point Barrow* 's owner on twelve previous occasions in the two-and-a-half months before his injury. The district court granted summary judgment in favor of the tugboat's owner, concluding that Papai was not a seaman within the meaning of the Jones Act.

A divided panel of our court reversed. The panel majority held that the relevant inquiry was "not whether plaintiff had a permanent connection with the vessel [but] whether plaintiff's relationship with a vessel (or group of vessels) was substantial in terms of duration and nature, which requires consideration of the total circumstances of his employment." *Papai v. Harbor Tug & Barge Co.*, 67 F.3d 203, 206 (9th Cir. 1995). The panel majority concluded that the group of employers who hired workers out of the union hall could be considered a common employer for purposes of determining a worker's seaman status. As a result, the panel majority held that "all the circumstances surrounding the work performed by plaintiff for defendant as a deckhand prior to (and after, if any) the accident, as well as work performed for other employers during the relevant time period should be considered in making the determination." *Id.* The panel majority then concluded that there were triable issues of fact as to whether the plaintiff had a

substantial connection with the vessels upon which he worked. *Id.*

The Supreme Court granted certiorari and reversed. Most of the Court's discussion focused on whether our majority decision properly allowed Papai to rely on work done for other employers; adopting the view of the dissent, the Court held that we misapplied *Latsis* by not requiring a showing of common ownership or control. *Papai*, 117 S. Ct. at 1541. However, as part of this discussion, the Court applied the two-part *Latsis* test to Papai's work aboard the *Point Barrow* and concluded that no reasonable jury could conclude that Papai was a seaman as a matter of law. The Court commented thusly on the "substantial connection" inquiry:

> For the substantial connection requirement to serve its purpose, the inquiry into the nature of the employee's connection to the vessel must concentrate on whether the employee's duties take him to sea. This will give substance to the inquiry both as to the duration and nature of the employee's connection to the vessel and be helpful in distinguishing land-based from sea-based employees.

Id. at 1540. Then, a few paragraphs later, after noting that Papai's work on the *Point Barrow* was not of a seagoing nature, the Court concluded that Papai's assignment to the *Point Barrow* on the day of the injury "was the sort of 'transitory or sporadic' connection to a vessel or group of vessels that . . . . does not qualify one for seaman status." *Id.* at 1542 (quoting *Latsis*, 115 S. Ct. at 2190).

For our present purposes, *Papai* and *Latsis* dictate that when we determine whether the nature of Cabral's

connection to Barge 538 is substantial, we should focus on whether Cabral's duties were primarily sea-based activities. In both cases, the Supreme Court emphasized that the purpose of the substantial connection test is to separate land-based workers who do not face the perils of the sea from sea-based workers whose duties necessarily require them to face those risks. *See Papai*, 117 S. Ct. at 1540 ("[T]he inquiry into the nature of the employee's connection to the vessel must concentrate on whether the employee's duties take him to sea."); *Latsis*, 115 S. Ct. at 2190 ("[T]he Jones Act remedy is reserved for sea-based maritime employees whose work regularly exposes them to 'the special hazards and disadvantages to which they who go down to sea in ships are subjected.' " (quoting *Seas Shipping Co. v. Sieracki*, 328 U.S. 85, 104 (1946) (Stone, C.J., dissenting))).

We conclude that the undisputed evidence shows that Cabral was a land-based worker who had only a transitory or sporadic connection with Barge 538. Cabral was hired to work on Barge 538 as a crane operator and not as a crew member. Cabral presents no evidence showing that he was ever aboard Barge 538 when it was anywhere but the Ford Island Ferry project. In fact, when the barge was used in another part of the harbor on a soil sampling project on the weekend immediately preceding the accident, Cabral was not aboard because the barge's crane was not used. Furthermore, Cabral presents no evidence showing that he would continue to work aboard Barge 538 after the Ford Island Ferry project was completed. All of the evidence points to one conclusion: that Cabral was a land-based crane operator who happened to be assigned to a project which required him to work

aboard Barge 538. In sum, we hold that the district court correctly concluded that there was no evidence from which a reasonable jury could infer that Cabral met the substantial connection test. As a result, we affirm the district court's judgment in favor of Healy.[1]

AFFIRMED.

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[1] Our conclusion that Cabral did not have a substantial connection with Barge 538 means we need not reach the issue of whether Barge 538 was a vessel in navigation. Thus, we express no opinion on this issue.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

ROBERT A. CABRAL, Plaintiff, vs. HEALY TIBBITS BUILDERS, INC.; and JOHN DOES 1-10, Defendants.	) CIVIL NO. 95-00126 SPK)) ORDER DENYING) PLAINTIFF'S MOTION) FOR SUMMARY) JUDGMENT AND) GRANTING) DEFENDANT'S CROSS) MOTION FOR) SUMMARY JUDGMENT)) (Filed Jun. 19, 1995)

ORDER DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND GRANTING DEFENDANT'S CROSS MOTION FOR SUMMARY JUDGMENT

I. OVERVIEW

Plaintiff Robert A. Cabral ("Cabral"), who was allegedly injured when he slipped and fell on a barge being used as a platform for a crane in Pearl Harbor, seeks summary judgment as to his asserted status as a "seaman" under the Jones Act and general maritime law and his entitlement to maintenance and cure. Defendant Healy Tibbits Builders, Inc. ("Healy") has brought a cross motion for summary judgment, seeking a ruling by this

court that Plaintiff is not a "seaman" and thus not entitled to recover maintenance and cure under general maritime law, damages for unseaworthiness, or damages for negligence under the Jones Act.

II. BACKGROUND

Cabral was injured on September 26, 1994 while working for Healy as a crane operator on Barge 538. The project Cabral was working on at the time involved the removal and reinstallation of "mooring dolphins" for the Ford Island ferry at Pearl Harbor. The dolphins are made up of timber piles driven into the bottom of the harbor. Cabral apparently began working on the project on August 15, 1994, a little less than a month and a half before he was injured. Plaintiff and Defendant disagree as to what percentage of Cabral's work time was spent on Barge 538. They also disagree as to whether Cabral worked on any other vessels.[1]

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[1] Plaintiff cites to the deposition of one Richard Heltzel, presumably a Healy company official, who testified that Cabral did "most," or about 90 percent of his work on Barge 538, though he might have done a few hours of work on shore. Defendant cites to an "employment chronology" for Cabral, presumably produced by Healy, showing that he worked for the company from July 1993 to October 1994 and that his assignments involved operating cranes "onshore," "on beach," at "Kahe Power Plant, Oahu," at "Kal Hwy, Hawaii Kai, Oahu," at "Hickam Dormitory," and at "Hickam AFB," and that such assignments constituted significantly more than 10 percent of his total work time. It appears that Plaintiff is considering only the period after August 15, 1994, when Cabral began working on the Ford Island project. Defendant, on the other hand, seeks to direct the court's attention to a longer period over which

Barge 538, which is owned by Defendant Healy, is 160 feet long and 50 feet wide. It draws about five feet of water at the stern and four feet at the bow. The bow and stern are raked. The barge's name is printed on the stern and on the sides. "New York," the name of the barge's hailing port, is painted on the stern. The barge is not self-propelled, but must be towed from place to place. Once anchored, the barge can move a limited distance fore and aft by manipulation of bow and stern lines using a winch. The United States Coast Guard inspects Barge 538 once a year for seaworthiness and compliance with various safety regulations. The barge has seen service in construction projects in Manila Bay in the Philippines and in Nawiliwili Harbor on Kauai as well as in Pearl Harbor.

Mounted atop the barge is a 360-degree crane with a 125-foot boom. The frame of the crane is permanently welded to the deck of the barge. The barge also contains a 20-foot-long shipping container for small tool storage, and a desk. There is also a generator to power lights for nighttime work.

On September 24, 1994, two days before Cabral was injured, Barge 538 was temporarily relocated to another area of the harbor for use by a company doing test borings on the harbor bottom. The test boring job was completed on the afternoon of September 25, 1994 and the barge was returned to the Ford Island worksite.

Cabral alleges that he was injured on the morning of September 26, 1994 when he slipped and fell on mud that

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Cabral worked for Defendant in a variety of assignments, some land-based and some on the water.

had accumulated on the barge during the test boring operation. He sued, seeking recovery for negligence under the Jones Act, for unseaworthiness, and for maintenance and cure.

III. DISCUSSION

A. Whether Cabral was a "Seaman."

The Ninth Circuit has adhered to a three-part test for determining whether a worker is a "seaman" for purposes of the Jones Act and general maritime law:

> (1) the vessel on which the claimant was employed must be in navigation;
>
> (2) the claimant must have a more or less permanent connection with the vessel; and
>
> (3) the claimant must be aboard primarily to aid in navigation.

McKinley v. All Alaskan Seafoods, Inc., 980 F.2d 567, 569 (9th Cir. 1992) (*citing Estate of Wenzel v. Seaward Marine Servs., Inc.* 709 F.2d 1326, 1327 (9th Cir. 1983)).

The United States Supreme Court rejected the third prong of this test in *McDermott International, Inc. v. Wilander*, 498 U.S. 336 (1991), holding that to be a "seaman" one need only be "doing the ship's work," and need not be directly engaged in the navigation of a vessel. The Plaintiff in *Wilander* was a paint foreman injured while assigned to a paint boat chartered by the defendant. Accordingly, the fact that Cabral was a crane operator,

and not at all engaged in propelling, steering or otherwise "navigating" Barge 538, is not dispositive. If a painting foreman aboard a paint boat can be said to be doing "the ship's work," the same can probably be said about a crane operator aboard a crane barge.

Assuming that Cabral was doing the work of Barge 538 within the meaning of *Wilander,* two questions remain: (1) Was Barge 538 a "vessel in navigation?" (2) Did Cabral have a "more or less permanent" connection with the barge? (The Supreme Court recently further refined the seaman test in *Chandris, Inc. v. Latsis,* 1995 WL 352858 (U.S. June 14, 1995), holding that "the duration of a worker's connection to a vessel and the nature of the worker's activities, taken together, determine whether a maritime worker is a seaman[.]")

1. Whether Barge 538 was a Vessel in Navigation.

To answer the first question, Plaintiff relies primarily on *Wenzel v. Seaward Marine Services,* 709 F.2d 1326 (9th Cir. 1983), in which the Ninth Circuit reversed this court's grant of summary judgment in a case involving a submerged cleaning and maintenance platform known as a "SCAMP." Plaintiff Wenzel was killed while cleaning the sea chest of a Navy ship. Seaward Marine used the SCAMP, an unmanned saucer-shaped vehicle that traveled along the hull of a ship, in its cleaning operations. Wenzel's estate argued that the SCAMP was a "vessel in navigation" and that Wenzel was a seaman employed to aid in the navigation of the SCAMP.

In holding that summary judgment in favor of Seaward was inappropriate, the Ninth Circuit noted that various special purpose craft, "far different from traditional seafaring ships," have been held by courts to be vessels. *Id.* at 1328. The appellate court concluded that Wenzel's status as a seaman and whether the SCAMP was a vessel were close questions of fact precluding summary judgment. *Id.*

Healy does not attempt to distinguish *Wenzel*, but instead relies on *DiGiovanni v. Traylor Bros., Inc.*, 959 F.2d 1119 (1st Cir. 1992), *cert. denied*, 113 S.Ct. 87 (1992), in which the First Circuit held that a Carpenter's Union member who slipped and fell while assigned to work on a barge being used as a platform for a construction crane was not a "seaman" within the meaning of the Jones Act. The First Circuit noted the Supreme Court's observation in *Wilander* that the Jones Act was intended to recognize that seamen who go down to sea in ships incur special hazards not incurred at dockside. Accordingly, the appeals court held that "if a barge or other float's purpose or primary business is *not* navigation or commerce, then workers assigned thereto for its shore enterprise are to be considered seamen only when it is in actual navigation or transit." *Id.* at 1123.

Healy contends that the holding in *DiGiovanni* "has quickly become the standard for other courts," *citing, e.g., Sala v. Gates Constr. Corp.*, 868 F.Supp. 474 (E.D.N.Y. 1994); *Taylor v. Cooper River Constructors*, 830 F.Supp. 300 (D.S.C. 1993). Healy further argues that Barge 538's primary purpose or business was not navigation or commerce, i.e., the transport of goods or people over navigable waterways. Moreover, Barge 538 was not in actual navigation

or transit at the time Cabral was injured. Thus, according to Healy, Cabral does not meet the test for seaman status laid out in *DiGiovanni*.

The Ninth Circuit cited *DiGiovanni* with apparent approval in *Kathriner v. UNISEA, Inc.*, 975 F.2d 657 (9th Cir. 1992), paying particular attention to the First Circuit's "primary purpose or business" test. *Kathriner*, however, involved a floating fish processing plant built inside the gutted hull of an old liberty ship and permanently anchored and docked at its port in Alaska. The Ninth Circuit had little trouble finding that a worker in the fish processing plant was not a "seaman" for Jones Act purposes. The *Kathriner* court did not overrule *Wenzel*, but instead distinguished the case by noting that although neither the SCAMP nor the fish processing factory in *UNISEA* could navigate the high seas,

> the SCAMP is still an independent mechanism that is designed to perform its function in the water. The UNISEA, however, is designed as a floating factory – merely extending land over water for the purpose of increasing the usable space of a dockside fish processing operation.

Kathriner, 975 F.2d at 660.

It would seem that the answer to the question of whether Barge 538 is a vessel in navigation depends on whether the barge is more like the UNISEA, i.e., "merely extending land over water," or the SCAMP, an "independent mechanism" performing its function on the water. On balance, it appears Barge 538 has more in common with the SCAMP than the UNISEA. It is undisputed that the barge has crossed the high seas for use in construction projects on Kauai and in the Philippines. Such

mobility certainly distinguishes Barge 538 from the UNI-SEA, making it more than a simple extension of a land-based work area.

Assuming without deciding that Barge 538 is a vessel in navigation for purposes of the instant case, however, a question remains as to whether Cabral had the requisite employment-related connection to the barge at the time of his accident. The court finds that he did not.

2. Whether Cabral had a More or Less Permanent Connection with the Vessel.

As already noted, Cabral contends he spent more than 90 percent of his working time on Barge 538 and thus owed his "allegiance" to the barge. Healy, on the other hand, notes that Cabral's assignment on Barge 538 was only one of numerous jobs he performed for Healy over a period of about a year and a half as a crane operator and member of the Operating Engineers Union.[2] Healy argues that far from being a member of any ship's crew, Cabral was a land-based employee assigned to operate cranes on land and water.

Cabral's focus on the brief period during which he worked for Healy on Barge 538 – as opposed to his overall employment as a crane operator – tends to produce a distorted picture of his work. He was, first and foremost, a crane operator. Much, if not most, of his

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[2] As a member of the union, Cabral apparently worked for Healy and other contractors on specific assignments. He was not a permanent employee of Healy, but was available for hire to Healy and other contractors as work came up.

work, excluding the period during which he was assigned to Barge 538, was done on land. His assignment to Barge 538 was temporary; it would end when the work on the mooring dolphins was complete. There is no indication in the record that Cabral owed a crew member's "allegiance" to Barge 538. Rather, the barge was simply a platform upon which he happened to be performing his work as a crane operator.

As the United States Supreme Court recently noted, the reason for requiring a "substantive connection" between a worker seeking seaman status and his or her purported vessel is "to separate the sea-based maritime employees who are entitled to Jones Act protection from those land-based workers who have only a transitory or sporadic connection to a vessel in navigation, and therefore whose employment does not regularly expose them to the perils of the sea." *Chandris*, 1995 WL 352858, at *10.

Cabral's connection with Barge 538 was at best transitory. Moreover, his work on a crane mounted atop a barge moored in a sheltered harbor is hardly the sort of employment that would regularly expose him to "the perils of the sea." The court finds that Cabral is not a seaman for purposes of the Jones Act and general maritime law. Accordingly, he is not entitled to recover in negligence under the Jones Act, or for unseaworthiness or maintenance and cure under general maritime law.

IV. CONCLUSION

Plaintiff's motion for summary judgment is DENIED. Defendant's cross motion for summary judgment is GRANTED.

IT IS SO ORDERED.

DATED: Honolulu, Hawaii, June 19, 1995.

/s/ Samuel P. King
SAMUEL P. KING
United States District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

ROBERT A. CABRAL, Plaintiff, vs. HEALY TIBBITS BUILDERS, INC.; and JOHN DOES 1-10, Defendants.	) CIVIL NO. 95-00126 SPK)) ORDER DENYING) PLAINTIFF'S MOTION) FOR) RECONSIDERATION OF) ORDER DATED JUNE) 19, 1995 DENYING) PLAINTIFF'S MOTION) FOR SUMMARY) JUDGMENT AND) GRANTING) DEFENDANT'S CROSS) MOTION FOR) SUMMARY JUDGMENT)) (Filed Jul. 20, 1995)

ORDER DENYING PLAINTIFF'S MOTION FOR RECONSIDERATION OF ORDER DATED JUNE 19, 1995 DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND GRANTING DEFENDANT'S CROSS MOTION FOR SUMMARY JUDGMENT

The court has reviewed Plaintiff's motion for reconsideration and Defendant's opposition thereto, together with the accompanying exhibits. The court finds that Plaintiff has demonstrated neither (1) the discovery of new material facts not previously available, (2) an intervening change in law, nor (3) manifest error of law or fact in the court's June 19, 1995 order. Accordingly, Plaintiff's motion for reconsideration is DENIED.

IT IS SO ORDERED.

DATED: Honolulu, Hawaii, July 20, 1995.

/s/ Samuel P. King
SAMUEL P. KING
United States District Judge